

OCT 31 2006

**REMARKS**

In the non-final office action mailed July 31, 2006, claims 20-60 were pending and stand rejected. In this response, claims 20, 25, 35, 37, 39, 42, 45, 46, 49, 53 and 59 have been amended. Reconsideration of the present application as amended and including claims 20-60 in view of the remarks that follow is respectfully requested.

**Claim Objections**

Claims 35, 45 and 59 were objected to for various informalities. The informalities have been addressed as suggested in the office action, and withdrawal of the objection to claims 35, 45 and 59 is respectfully requested.

**Claim Rejections – 35 USC §112, second paragraph**

Claims 25, 41, 42 and 46-60 were rejected under 35 USC §112, second paragraph as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Specifically, claim 25 was rejected for lack of antecedent basis in lines 2 and 3 for medial surface. Claim 25 has been amended to provide antecedent basis for medial side thereof, and withdrawal of this basis of the rejection is respectfully requested.

Claims 41, 42 and 46-60 were rejected since it was asserted to be unclear what the term “other” was referring to in claims 41, 42, 46 and 53 in the recitation of “... a lateral surface opposite the other of first and second distractor tips....” It is noted that the quote in the office action is incorrect since each of claims 41, 42, 46 and 53 recites “... a lateral surface opposite the other of said first and second distractor tips....” The “said” indicates that the “the other” in the claims is referring to the other of the first and second distractor tips already introduced in the claim and not the at least one distractor tip being further defined in the claims. It is respectfully submitted that claims 41, 42, and 46-60 are clear and definite and withdrawal of this basis of the rejection is respectfully requested.

OCT 31 2006

**Claim Rejections – 35 USC §101**

Claims 20-60 were rejected under 35 USC §101 because it was asserted they are drawn to non-statutory subject matter. Claims 20, 39, 46, and 53 were considered to positively recite part of a human i.e. "corresponding to a curvature of an inner portion of a cortical rim of vertebral endplates in a sagittal plane." Claims 37, 42, 49 and 53 were considered to positively recite part of a human i.e. "corresponding to a curvature of the inner portion of the cortical rim of vertebral endplates in a coronal plane."

It is respectfully submitted that these claims do not claim any part of the human body, but rather relate a curvature of the transition surfaces to a portion of the human body. The same claim language was employed in the parent application, now issued as U.S. Patent No. 6,743,234, and was not considered to claim part of the human body, and the rejection is traversed and no acquiescence in the rejection is herein made. Claims 20, 37, 39, 42, 46, 49 and 53 have been amended to clarify that the claims are directed to a shape of the distractor tip, and the claims recite that various surfaces of the tips have shapes that generally correspond to the shape of certain features of the spinal anatomy. Accordingly, claims 20-60 are directed to statutory subject matter and withdrawal of this basis of the rejection is respectfully requested.

**Claim Rejections – 35 USC §102 and §103**

Claims 20-23 and 25-60, as best understood by the Examiner, were rejected as being anticipated by U.S. Patent No. 5,505,732 to Michelson, and claim 24 was rejected as being obvious in view of the '732 patent to Michelson.

The claims 20-60 have been amended and relate the shape of the transition surfaces to the anatomy of the vertebral endplates, and these claims recite structural features not taught or suggested in the '732 patent and that did not appear to have been considered in the office action since it was asserted that these features included part of the human body. As discussed above, independent claims 20, 39, 46 and 53 do not include the human body in their scope. For example, amended claim 20 recites that the assembly includes a first distractor and a second distractor with "a second distractor tip extending from the distal end of said second shaft, said second distractor tip including opposite first and second surfaces defining a second distraction

height substantially equal to said first distraction height, wherein at least one of said first and second distractor tips includes a first transition surface extending between a distal end surface and said first surface of said at least one distractor tip and a second transition surface extending between said distal end surface and said second surface of said at least one distractor tip, said first and second transition surfaces each having a curvature shaped to generally correspond in shape to a curvature of an inner portion of a cortical rim of vertebral endplates in a sagittal plane....” There is no teaching or suggestion of the shape of the transition surfaces having a curvature shaped as recited in claim 20, and claim 20 along with claims 21-38 depending therefrom are allowable.

Claim 39 is directed to an assembly with first and second distractors and the second distractor including “a second distractor tip extending from the distal end of said second shaft, said second distractor tip including opposite first and second surfaces defining a second distraction height, wherein at least one of said first and second distractor tips includes a first transition surface extending between a distal end surface of said at least one distractor tip and said first surface of said at least one distractor tip and a second transition surface extending between said distal end surface and said second surface of said at least one distractor tip, said first and second transition surfaces each having a curvature shaped to generally correspond in shape to a curvature of an inner portion of a cortical rim of vertebral endplates in a sagittal plane...” There is no teaching or suggestion of any transition surfaces having a curvature shaped as recited in claim 39, and claim 39 along with claims 40-45 depending therefrom are allowable.

Claim 46 is directed to an assembly the includes first and second distractors including first and second distractor tips and “wherein at least one of said first and second distractor tips includes a lateral surface opposite the other of said first and second distractor tips when positioned therealong and a first transition surface extending between a distal end surface of said at least one distractor tip and said lateral surface, said first transition surface having a curvature shaped to generally correspond in shape to a curvature of an inner portion of a cortical rim of vertebral endplates in an axial plane ....” There is no teaching or suggestion of any transition surfaces having a curvature shaped as recited in claim 46, and claim 46 along with claims 47-52 depending therefrom are allowable.

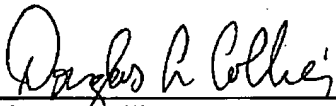
OCT 31 2006

Claim 53 is directed to an assembly the includes first and second distractors having first and second distractor tips and "wherein at least one of said first and second distractor tips includes a lateral surface opposite the other of said first and second distractor tips when positioned therealong and a first transition surface extending between said lateral surface and said first surface and a second transition surface extending between said lateral surface and said second surface, said first and second transition surfaces each having a curvature shaped to generally correspond in shape to a curvature of an inner portion of a cortical rim of vertebral endplates in a coronal plane ...." There is no teaching or suggestion of any transition surfaces having a curvature shaped as recited in claim 53, and claim 53 along with claims 54-60 depending therefrom are allowable.

### CONCLUSION

In view of the foregoing amendments and remarks, it is respectfully submitted that the application is in condition for allowance with pending claims 20-60. Reconsideration of the subject application as amended is respectfully requested. Timely action towards a Notice of Allowability is hereby solicited. The Examiner is encouraged to contact the undersigned by telephone to resolve any outstanding matters concerning the subject application.

Respectfully submitted,

By:   
Douglas A. Collier  
Reg. No. 43,556  
Krieg DeVault LLP  
One Indiana Square, Suite 2800  
Indianapolis, Indiana 46204-2079  
(317) 238-6333 voice